WESTERN LAW JOURNAL

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APPORTIONMENT OF STATE REPRESENTATIVES IN OHIO.

[At this time, when the periodical re-districting of the State is about to take place, the question, whether a county can be divided in order to form a district, becomes one of great interest. It has been, and will continue to be our invariable rule, in the conduct of this Journal, to avoid every thing of a partizan character. In this we find no difficulty, except when some Constitutional question, as in the present case, assumes that aspect; and then our columns are always open, to an equal extent, for both sides. We now publish, as well on account of its intrinsic merit, as its official source, the opinion of the Attorney General; and, that both sides may be heard, we add a review of that opinion by David T. Disney. We consider it no infraction of the rule we have prescribed to ourselves, to express the opinion, that a division of counties is not prohibited by the Constitution. EDS.]

SPECIAL REPORT OF THE ATTORNEY GENERAL.

ATTORNEY GENERAL'S OFFICE,
COLUMBUS, JAN. 17, 1848.

To the Senate of Ohio:

GENTLEMEN: I have considered the questions embodied in your resolution of the 12th instant, and beg leave to submit the following opinion. The resolution is in these words:

"*Resolved*, That the Attorney General be, and he is hereby requested to furnish, in writing, to this Senate, his legal opinion in relation to the power of this General Assembly to divide counties either for the formation of Senatorial or Representative purposes."

The provisions of the Constitution which are supposed to have a bearing on these questions, are the following:

That the number of Representatives on the quadrennial enume-

ration shall be fixed by the Legislature, "and apportioned among the several counties according to the number of white male inhabitants above twenty-one years of age in each." *Art.* 1, § 2.

That the Representatives shall be chosen annually, "by the citizens of each county, respectively." *Art.* 1, § 3.

That no person shall be a Representative who shall not have resided "within the limits of the county in which he shall be chosen, one year next preceding his election." *Art.* 1, § 4.

That the number of Senators shall at the same time "be fixed by the Legislature, and apportioned among the several counties or districts established by law, according to the number of white male inhabitants of the age of twenty-one years in each, and shall never be less than one-third, nor more than one-half of the number of Representatives." *Art.* 1, § 6.

That the "Senators shall be chosen biennially by the qualified voters for Representatives, and on their being convened in consequence of the first election, shall be divided by lot from their respective counties or districts, as nearly as may be, into two classes." *Art.* 1, § 7.

That no person shall be entitled to vote "except in the county or district in which he shall actually reside at the time of the election." *Art.* 4, § 1.

In view of these provisions, the question is made, whether in the apportionment of Representatives or Senators, a county may be divided.

The great object of these constitutional provisions, I take to be, the securing to the people equality of representation, having due regard to local interests; each member of the General Assembly is to be the immediate representative of a certain number of the people, as fixed by the stated enumerations.

This object is to be accomplished by an apportionment of Representatives and Senators.

In respect of Representatives, the language is, that they are to be apportioned among the several counties; and as to Senators, they are to be apportioned among the several counties or districts established by law.

I cannot see in this language, nor in any other provision of the Constitution, any difficulty in carrying out the great object of immediate local representation. Where a county contains a population entitled to two Representatives, I see no objection to making each one, truly and immediately, the Representative of that portion of the people entitled to a Representative.

Take it hat the ratio fixed by the census is 5,000 electors to each Representative, and that a particular county contains 10,000 electors. It seems to me much more in accordance with the spirit of the Constitution, much nearer the great object of immediate local representation, that each of these representatives should stand in the place of 5,000 electors, and be the peculiar and direct exponent of their interests, than that the two should stand for the 10,000. In the latter case, neither of the constituencies has a Representative which it can call its own, and yet the Constitution in effect provides that each body of 5,000 shall have a Representative for itself.

I think it cannot be doubted that the spirit of the Constitution favors local representation, and the closest practicable alliance between the people and their Representatives. Equivocal or doubtful expressions ought not to be construed to defeat an object so vital.

Representatives are to be apportioned among the several counties according to the number of white male inhabitants above twenty-one years of age in each. This is the Constitutional provision. The *manner* of that apportionment is not specified. So that the people of the county get their proper number of Representatives, their just proportion, it is left at large so far as the mere letter of the law goes—whether, as to a county entitled to two, they shall be apportioned to all the population in common, or whether they shall be apportioned to the two constituencies, so that each constituency or body of people entitled to a Representative, shall have a Representative.

The apportionment may be either way without doing violence to the language used.

I find, on reference to the Constitutions of other States of the Union, a diversity in the manner of the apportionment of Representatives. In some of the States, a division of counties is expressly forbidden, in others expressly provided for, and in others, as in our own, no provision for or against such division—no special direction as to the manner of the apportionment. In much the largest portion of the State Constitutions, in which express provision is made as to the manner of apportionment, the object seems to be, as near as possible, whether, by the division of counties, or the separation of cities and large towns from the body of the county, to give every section of the people, entitled to a Representative, a separate Representative.

I mention this, not only to show there is no practical objection to such a mode of apportionment, but as a guide to what is understood to be the true spirit of representation.

I find in the Constitution recently adopted by the people of New York, this principle of local representation fully carried out; and I now particularly refer to that Constitution, to show, that on the subject of apportionment, language is there used very nearly identical with the language used in our Constitution. It is as follows:

"The members of the Assembly shall be apportioned among the several counties of this State, by the Legislature, as nearly as may be, according to the number of their respective inhabitants, excluding aliens and persons of color not taxed, and shall be chosen by single districts."

Immediately following the above, is this provision:

"The several Boards of Supervisors in such counties of this State as are now entitled to more than one member of Assembly, shall assemble on the first Tuesday of January next, and divide the respective counties into Assembly districts, equal to the number of members of Assembly to which such counties are now severally entitled to by law."

And in the next section is the following provision:

"The Legislature, at its first session after the return of every enumeration, shall re-apportion the members of Assembly among the several counties of the State, in manner aforesaid, and the Boards of Supervisors, in such counties as may be entitled under such a re-apportionment to more than one member, shall assemble at such time as the Legislature making such re-apportionment shall prescribe, and divide such counties into Assembly Districts in the manner herein directed; and the apportionment and Districts so to be made, shall remain unaltered until another enumeration shall be taken under the provision of the preceding section."

We see here, in one section, provision is made for apportioning the Representatives among the counties, and in the next for dividing the counties. Now, to say that the provision that the Representatives shall be apportioned among the counties, conveys the idea of apportioning to entire counties, involves a direct repugnancy, or imputes to the late Convention of New York the folly of placing side by side, in so solemn an instrument, enactments totally contradictory.

Another argument, to show that this provision for apportionment among counties is quite consistent with the division of counties, may be drawn from the Constitution of the United States, and the construction almost universally put upon it.

The provision of the second section of the first article of the

Constitution, in regard to the apportionment of Representatives, is, that "Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers," &c.

What difference is there in the force of the expression, apportionment among the several States of the Union, and apportionment among the several counties of a State? If, in working out the Federal apportionment, a State may be divided, what is there to prevent the division of a county under our Constitution?

The fourth section, first article of the Federal Constitution, provides, that "the time, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators."

In point of fact, the division of a State is only *a manner* of holding elections, and has been universally so considered; and while the whole number of Representatives in Congress is to be apportioned to the States as entireties, according to population, they may be elected by the entire State, or by dividing it into Districts. Either manner is perfectly consistent with the Constitutional mode of apportionment.

Apportionment among counties is therefore not inconsistent with the division of counties. It may be worked out by apportioning to entire counties, or parts of counties, if the manner of the apportionment or of the election is not indicated in the Constitution. It is a matter of expediency, not of power, having respect to the manner rather than to the substance. Other things being equal, that mode of apportionment which most closely binds the Representative to the constituent, which gives, in the most direct way, the fullest effect to the principle of representation, is undoubtedly the best.

It may happen that, in a large county, with a population equal to two or more Represe..tatives, the pursuits and interests of the entire people are so identical as not to require division, or separate representation of the parts. So, too, it may happen that the population, in part urban, in part agricultural, may be engaged in totally opposite business. The city may have a population greater or less than the country, but each has the full number for a Representative. If they vote together, it may happen that the city outvotes the country, or the country the city. In either event, one has too many Representatives, and the other in effect none. The interests of

commerce and manufactures are represented at the expense of agriculture, or the reverse. It should require very clear Constitutional provisions to lead to such inequalities, and perpetuate an intolerable grievance.

Those who would so construe this provision for the apportionment among counties as to prevent their division, will find equal difficulties in the way of uniting two or more counties in the election of a Representative. If there is no power to limit, where is the power to enlarge? If you cannot apportion a Representative to territory less than a county, how can you apportion one to territory larger than a county? Such a territory, greater or less than a county, would be a district, or something other than exactly a county, in either case. Now, in respect to apportionment of Senators, the word district is used, obviously to express territory other than a county, but no such term is used as to the apportionment of Representatives.

No one doubts that two or more counties may be united to form a district for a Representative, notwithstanding the word district is not used, and the Constitution is silent as to that mode of appointment.

Again, with any such limited meaning of the word counties, how could we get along, in the case of a Representative district formed out of two or more counties, with that provision of the Constitution which requires the Representative to reside in the county in which he shall be chosen?

It is perhaps true, that the framers of our Constitution had no distinct idea either of the division or union of counties in the formation of a Representative district. There was no present necessity for such measures. At that day, the State only comprised nine counties in its whole extent, each of them fully entitled to at least a Representative and a Senator, according to the apportionment then made. Language is used that might be argued to imply they intended there should at least be no uniting of counties for a Representative. A person studious to find a distinction where none was intended, might argue against the uniting of counties for a Representative, because the word *district* is used as to Senators, and omitted as to Representatives, and from the further provision as to the residence of the Representative in the county. So, too, by giving undue force to words of equivocal meaning, a plausible argument might be made against the division of counties.

It seems to me a much sounder rule for the interpretation of

these Constitutional provisions is, to consider them as establishing the principle of local apportionment, and not the special manner of the apportionment.

The division of a county may be in the highest degree necessary to carry out the principle, and to meet the very spirit and true meaning of the Constitution; against that manner of apportionment there is certainly no express prohibition, and I can see none by implication.

As to the power of division in the apportionment of Senators, I think, for the same general reasons, it belongs to the General Assembly.

It is worthy of remark, as to Senatorial apportionment, that it is to be made among the several counties or districts, to be established by law. As the number of Senators is so limited as never to exceed one-half the number of Representatives, the constituency for a Senator must be double that of a Representative. Now, suppose the population of a county is so great as to comprise two Senatorial constituences, as is now the case with Hamilton county under the existing ratio—the city of Cincinnati having the requisite number for one Senator, and the residue of the county the requisite number for another—can it be doubted that the city can be divided from the county at large in the apportionment of the two Senators? May not the city be formed into one district, the residue of the county into another? Where is the authority for saying that a district must comprise two or more counties? The Constitution gives no such definition. A district may as well be a part of a county, as an entire county, or two or more counties. There is nothing in the Constitution to limit it as to territory. The only limit is population. Whenever, in one county, there is a population entitled to two Senators, there is a population entitled to two districts. The very letter of the Constitution, as well as its spirit, fortifies this position.

But, to say that a county may be divided so as to form Senatorial districts, and must remain entire as to Representatives—to establish a distinction between the two modes of apportionment, where no necessity or propriety for such distinction exists, in fact, would require very clear language.

A Senator is not so strictly a local representative as a member of the more popular branch. In theory, he is a little further removed from the people. He represents a larger portion, and more extended and diversified interests. It would seem, in effect, a contradiction

to give him a larger constituency than a Representative, and yet a more limited territory; to make him more general as to numbers, and more local as to interests.

Finally, it may be said, that if the exercise of this power of apportionment, so as to secure the great benefit of local representation, were drawn into doubt, it would be safest to resolve that doubt in favor of such power. The error, if it be one, would be on the side of public rights, in a matter most essential to the true spirit of our institutions and the just expression of popular will.

I am, therefore, of opinion, that the General Assembly has the power to divide a county in the apportionment of Senators and Representatives. Respectfully submitted,

HENRY STANBERY, *Atty. Gen.*

THOUGHTS UPON "THE OPINION OF THE ATTORNEY GENERAL, IN RELATION TO THE POWER OF THE LEGISLATURE IN CERTAIN CASES."

The introductory remarks with which the Attorney General prefaces his opinion, are so general in their character, and their value so completely involved with his subsequent argument, that they may be passed without remark, except on a single point. It is claimed in the case cited from the Constitution of the State of New York, that a provision requiring the apportionment of Representatives among the several *counties*, is not repugnant to a provision requiring them to be chosen by single districts. We do not know that this has been denied; yet, in view of the origin and history of representation in legislative assemblies, the general modern organization of communities by counties, and to keep within the limits of our Federal Union, the common and general practice on that subject, it might well be doubted whether, in the absence of a clause requiring them to be chosen in a particular manner, the Legislature would have a right to require them to be chosen *in any other way*, than that pointed out for their *apportionment*.

The necessity of choosing by single districts in this case, however, is a necessity imposed by the *Constitution* of New York, and not by the *Legislature* of that State; and it by no means follows, that in the absence of such a clause, the grant of power to apportion among the counties, would confer it upon the Legislature; if so, the addi-

tion was superfluous, or at least restrictive. The power to apportion, and the power to compel the choice of Representatives to be made in a particular manner, are two distinct and separate powers, and the grant of one by no means involves the grant of the other. But it seems to be claimed, that as our Legislature possesses a similar power to apportion, the inference is established that the other power necessarily follows by implication. It however may be replied, that the Constitution of New York might have provided that their Representatives should be chosen by double instead of single districts, and the inferences, varying with the case, would be just as well established, notwithstanding the conclusions would be so entirely variant; and that if such reasoning be correct, the power of the General Assembly is unlimited over the case, except so far as it may be restrained by special provisions of the Constitution. If the power to apportion and the power to prescribe the elections by single districts, be grants of power, then the Legislature of New York has both, and the Legislature of Ohio has but one. But if these clauses be *restrictive* upon the general powers of those bodies, the Legislature of New York is restricted in both cases, and the Legislature of Ohio is equally restrained in relation to the power to apportion, and it is the object of our inquiry to ascertain how far it is limited in the power to prescribe "the manner of choosing."

The second argument upon which the Attorney General relies, is drawn from the practice in relation to the election of members of Congress; and he asks "what difference is there in the force of the expression, apportionment among the several States of the Union, and apportionment among the several counties of a State? If in working out the Federal apportionment, a State may be divided, what is there to prevent the division of a county under our Constitution?"

If these questions were put in relation to the power of a county to form districts within itself, the parallel perhaps might hold, and there might be some difficulty in the answer. But there is no similarity suggested between the power of a State to form general districts for one purpose, and the power of the State to violate particular and especial organization for another—the less, because even in the formation of such general districts, the boundaries of the counties have never been invaded, though to avoid it, great inequalities have resulted in regard to the number of population represented. But the questions are susceptible of yet another answer. The reason why

a State may be divided, and a county not, is because the power of the Legislature is not the same in the two cases. By the article quoted from the Federal Constitution, the Legislature has unbounded power over the time, place, and *manner* of holding the elections for Federal purposes; but by an article in our State Constitution, which the Attorney General has placed among his extracts, but, by a singular omission, never referred to in his argument, the Legislature can neither control the time, nor to a considerable extent, the manner of holding elections for State purposes.

The time must be on the second Tuesday of October, and the manner must be "*by the citizens of each county respectively.*" It is strange that notwithstanding this express provision of our Constitution, the Attorney General declares that the manner of the election is not indicated in it. Such an error is fatal to all his conclusions; and we now recur to his first argument only to add, that if, according to his reasoning, the power of the General Assembly is unlimited, it is only so in the absence of any especial limitation, and that here we have a limitation which expressly restrains its power; and "the only difference between the New York case and the one before us is, that while the Constitution of that State requires the Representatives to be chosen by single districts, our Constitution requires them to be chosen by "the citizens of each *county* respectively;" and this declaration of our Constitution is in accordance with the provision which restrains the residence of the Representative within "the limits of the county in which he shall be chosen." Since no principle is better settled than that the object of imposing a limitation as to residence, is because the Representative should "be an inhabitant of the place for which he is chosen," and it is perfectly obvious that the framers of our Constitution had contemplated the division of a county, for the formation of a district, they would have made the qualification clause in relation to residence, correspondent with such a state of fact. But according to the construction of the Attorney General, a man may represent a district without residing in it, provided his residence is within the limits of the county in which the district lies. And this is one of the absurdities to which his doctrine leads him.

But, entangled by his conclusions, the Attorney General seems anxious to fortify himself by a reference to the practice of appointing a Representative to territory *larger* than a county—notwithstanding, as he says, there is a want of Constitutional authority to do so. He, however, forgets that his opinion in relation to the power

to *divide* a county, is entirely without a precedent, *either in this or any other State*, and hence he has not even usage to sustain him; and besides, he can hardly be allowed to plead what he admits to be a violation of the Constitution in one case, to justify its infraction in another. To do this, would be to abolish it altogether. But the confession involved in the attempt is ample.

"It is true that the framers of our Constitution had no idea either of the division or union of counties, in the formation of a Representative district;" but we must dissent when he claims that it is best to consider all the passages in the Constitution which have relation to the election of Representatives, as merely relating to their *apportionment*. Such a sweeping and violent disposition of the provisions of the law, would probably aid him in arriving at his conclusion, but it must be confessed at the same time, that it would infuse a mass of nonsense into our Constitution, altogether unnecessary to the wants of the public interest. His views in relation to the advantages to be derived from single districts, might perhaps answer very well among the framers of a Constitution, but they are hardly well supported by our own, which provides for the election of eight Representatives in common by a single county, nor, we apprehend, would they as a *general* rule, find much favor with the authors of the very bill which led to the call for the opinion upon which we comment; since, in order to elect three by a common ticket, they have travelled so far as to group four large and separate counties together, to accomplish that single purpose.

In relation to Senatorial districts, it is asked, "where is the authority for saying that a district must comprise two or more counties;" and he adds, "the Constitution gives no such definition," and that "there is nothing in the Constitution to limit it as to territory." Whatever construction the phrase "district" might be susceptible of, when wrested from its context, it is not our province to inquire. But in construing the Constitution of our State, we must be governed by the general rule, and take it as a whole. And whether we have reference to the illustration given in the body of that instrument by its own apportionment, the constant and uniform usage of the General Assembly, the clear and definite meaning in relation to the Representative districts, or to the general and abstract principles of representation, we shall be led alike in every case to the one same and common conclusion; nor does that conclusion conflict in any degree with the common, obvious, and grammatical relations of the words as used. A Senator must of necessity represent a larger

population than a member of the more numerous branch of our General Assembly; and, in the language of the Attorney General, "to establish a distinction between the two modes of apportionment, when no necessity or propriety for such distinction exists in fact, would require very clear language," and the same regard should be had for county organizations, whether in the formation of Senatorial or Representative districts. The word district or districts, whenever used in the Constitution, in relation to territory, for Senatorial purposes, is ever found conjoined with the word county, or in the plural, counties, and is used simply as an equivalent for the latter, and intended to cover the case when two or more counties may be required to form such districts. With this natural and obvious meaning of the word, the construction of the entire Constitution is rendered perfectly harmonious, upon both the subjects of Senatorial and Representative districts—while any other leads to the confusion and contradiction in which the Attorney General has involved himself. It would be easy to show, that representation ever has been based upon the idea of separate *organized* interests, whether by tribes, centuries, counties, cities, or boroughs; but passing over all the ancient models, and coming down to the land, from which we more immediately derive our laws, it can at once be shown, that the representation of counties is the basis of the organization of the representative body; and that though cities and boroughs have participated in the privilege, yet in every case it has been by *especial grant.*

In our State, the different sections of the Commonwealth are organized by counties, with their county laws, their county officers, their county courts, their county records, their county representation; and so firmly have the rights and character of counties been established, that in those States where it has been desired to give a separate representation to their cities, provisions to that effect have been made in the Constitutions of the States—a provision altogether unnecessary, if, according to the Attorney General, their Legislatures possessed the power to divide the counties. But they possessed no such power, and in Ohio the Representatives must "be apportioned among the several counties," and shall be chosen by the citizens of each county *respectively*—no other distinction being made among the voters than to class them by "*counties respectively.*" Such is the declaration of the Supreme law, and no legislative action can change it.

It only remains to be added, that any effort in times of party excitement, to unsettle an old established usage, especially when as

in the present case, the result must enure to party advantage, will naturally raise the suspicion in every unprejudiced mind, that it has been prompted by other interests than those relating to the public good.

DAVID T. DISNEY.

ENGLISH COURT OF COMMON PLEAS: MICHAELMAS TERM, 1846.

SMART ET AL. *v.* SANDARS ET AL.

[Abridged from the 16 Law Journal Reports, C. P. 39.] *

PRINCIPAL AND FACTOR—LIEN ON GOODS—AUTHORITY TO SELL FOR REPAYMENT OF ADVANCES.

There is no principle of law by which, independently of contract, authority is given to a factor (after notice to his principal) to sell at any time for repayment of advances, without reference to its being for the interest of the principal to sell at that time and for that price, and that there was nothing in the pleadings in this case from which a contract of that nature could be inferred, and that the pleadings, therefore, afforded no answer to the action.

A DECLARATION in assumpsit stated, that in consideration that the plaintiffs had consigned to the defendants, as factors, a cargo of wheat, to be sold by them on commission, to be paid them by the plaintiffs, the defendants promised to obey the lawful orders of the plaintiffs, to be given by them to the defendants in regard to the sale and disposal of the wheat. Breach, that the defendants sold contrary to orders. Pleas: third, that the defendants were under advance to plaintiffs in respect of the cargo; that the defendants gave notice to the plaintiffs that they required repayment, or that they would sell the wheat and pay themselves; that the plaintiffs did not repay, and that for the purpose of reimbursing themselves, it was necessary for the defendants to sell the wheat; that they therefore sold the wheat for the best prices that could be obtained, and repaid themselves. Fourth, a similar plea, except that the advances were stated to have been made in respect of other consignments, and

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* NOTE BY THE EDITORS. We invite the especial attention of the profession to this case, not only because it relates to one of the most important and difficult questions arising in commercial law, but also because the arguments, both of counsel and Judges, although in an English Court, turned chiefly upon opinions expressed by the late Mr. Justice Story, in his works upon Agency and upon Bailments, and by the Supreme Court of the United States in a recent case.

averring that the defendants had a lien on the wheat in question for such advances.

Special demurrer to both pleas, on the grounds referred to in the argument and judgment.

Channel, *Serj.* (Taprell with him) in support of the demurrer. The plaintiffs charge the defendants with promising to obey the lawful orders of the plaintiffs, and that the defendants received the wheat on those terms. The defendants have not formally denied the contract by their plea, and have not traversed that they received the wheat on the terms mentioned in the declaration; but they say that they were justified in disobeying the lawful order of the plaintiffs. If the defendants rely on a right of sale, this must be matter of contract, and, therefore, this is a bad plea of non-assumpsit. The defendants should have traversed that this was a lawful or reasonable order. Upon this ground the plea is bad in point of form. Secondly, the plea is bad, because the plaintiffs are left in uncertainty whether the defendants mean to admit the promise, and deny that this was a lawful order, or whether they mean to deny the promise. Thirdly, the plea is double, because it relies not only on the advances made by the defendants, but also on the necessity for selling. Fourthly, it is bad in substance. It may be that a custom might have been proved, bearing out this plea; but the Court cannot treat such a custom as an inference of law; and independently of the contract, *Dufresne* v. *Hutchinson*, 3 *Taunt.* 117, and *Raleigh* v. *Atkinson*, 6 *Mee. & Wels.* 670, *s. c.* 9 *Law J. Rep.* (*n. s.*) *Exch.* 206, would seem to show that the plaintiff had a right to impose as a condition that the goods were not to be sold below a certain price. In Story on Agency, p. 330, § 371, it is laid down, "in certain cases where he has made advances as a factor, it would seem to be clear that he may sell, to repay those advances, without the assent of the owner, if the latter, after due notice of the intention to sell for the advances, do not repay him; but, except in a few and limited cases of this sort, the right of the holders of the lien seems to be confined to the mere right of retainer;" and then is cited 3 *Chit. on Com. and Manuf.* 551, some American authorities, and also *Pothonier* v. *Dawson*, *Holt's N. P. C.* 383. In the last case, however, it is to be observed that the question was not one of factor and principal, but of a pledge of goods, and there is a great distinction between that and a mere case of lien. *Smith's Leading Cases*, *page* 100.

Byles, *Serj.* (Crompton with him,) in support of the demurrer.

The plea is good in substance, and if so, it is good in form likewise. The main question raised by the third plea is, whether, if a factor have goods consigned for sale, and makes advances for more than their value, so that he has an interest in the goods, and that the consignor makes default in paying the advances, and has notice that a sale will take place, the factor has not an authority to sell implied by law, which being an authority coupled with an interest, is irrevocable. One of the cases cited by Story, for the position he lays down as above cited, is *Parker* v. *Brancher*, 2 *Law Rep.* (*U. S.*) *p.* 46, decided in the Supreme Court of Massachusetts, in 1839; but since that time, the doctrine there laid down has been supported by the Supreme Court of the United States, in *Brown* v. *M'Gran*, 14 *Peters' Rep.* (*U. S.*) 480. The Court there, after stating that any existing agreement may control or vary the right of the factor to sell the goods, proceeds to state: "On the other hand, where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities out of the proceeds of the sale; and the consignor has no right by any subsequent orders, given after advances have been made, or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities."

[MAULE, J. There the Court say the legal presumption is, that he is to sell in the exercise of a sound discretion—that is, he is not to look to his own interest only, but to the authority which he has to sell, subject to the exercise of his sound discretion.]

[CRESSWELL, J. Does not Story mean, in the passage which has been cited, that when goods are confided to be sold on a *general* discretion, and the factor has advanced upon them, the principal cannot revoke the authority? The pleadings here, however, do not show that the goods were to be sold at a general discretion of the factor, but "according to the lawful orders of the principal," regulated by the factor's judgment as to what were fair and lawful orders, or, as the judgment just cited states, "in the exercise of a sound discretion."]

This was a power coupled with an interest; because, so far as the

factor was concerned, the goods were a security for the repayment of the money advanced by him. *Gaussen* v. *Morton*, 10 *B. & C.* 731, *s. c.* 8 *Law J. Rep. K. B.* 313; *Walsh* v. *Whitcomb*, 2 *Esp.* 565. This amounted to such a bailment of the goods, that in default of payment of the advance upon request, the bailee was entitled to sell. *Pothonier* v. *Dawson.* It is laid down in *Story on Bailments*, § 308, *p.* 207, that "if there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to a prompt fulfillment of the engagement; and if the pawner neglects or refuses to comply, the pawnee may, upon due demand, and notice to the pawner, require the pawn to be sold;" and for this he cites 2 *Kent. Com.* 452. There is the same power by the law of Scotland, after a judicial order has been obtained. *Bell's Principles of the Laws of Scotland*, § 1364, *p.* 512, and by the law of France, *Code Civ. art.* 2078. In *Warner* v. *M'Kay*, 1 *Mee. & Wels.* 597, *s. c. Law J. Rep.* (*n. s.*) *Exch.* 276, Parke, B. seems to have thought a factor had such power, for, in answer to an argument of counsel, he says—"how is he to reimburse himself for advances?"

[MAULE, J. You do not allege that you sold under the circumstances stated as to your authority; but you say you had a right to do more than your original authority enabled you to do.]

The defendant shows, by his plea, that a special condition has been engrafted upon the original undertaking; and as this has arisen from circumstances which have happened subsequently to the original undertaking, it forms the subject of a special plea, and would not have been open to the defendant to prove under the general issue. *Smart* v. *Hyde*, 8 *Mee. & Wels.* 723, *s. c.* 10 *L. J. Rep.* (*n. s.*) *Exch.* 479.

[MAULE, J. You do not state the condition in your plea, and it remains, therefore, as a condition implied in the declaration.]

The defendant could not have traversed the lawfulness of the order, because that would be a traverse merely of a matter of law.

CHANNELL, *Serj.* in reply. The passage from *Story on Bailments*, § 308, is not in conformity with the English law; but if it were, the same author, at § 311, distinguishes the case of pawns from the ordinary case of liens, and says, "a mere right of lien is not understood to carry with it any right of sale to secure an indemnity."

[MAULE, J. In the ordinary case of pawning, the pawner knows nothing of the lender, nor *vice versa*.]

The mere fact of advancing money gives no right of sale. *Clark* v. *Gilbert*, 2 *Bing. N. C.* 343, *s. c.* 5 *Law J. Rep.* (*n. s.*) *C. P.* 61.

This is a custom of trade, and cannot be treated as a matter of law. In *Story on Agency, page* 333, § 375, it is said: "From what has been already said, it is clear that all general liens have their origin in the positive or implied agreement of the parties. Some of them, however, have now become so fixed and invariable, that no proof whatsoever is required to establish their existence; but Courts of Justice take notice of them as a matter of course." But here the Court is required to imply a usage to sell for the then best prices, irrespective of the question whether the goods might not have been better sold at another market, or at a different time. *Smart* v. *Hyde* stands upon a peculiar footing, but as an authority for the purpose cited, it is opposed to *Whittaker* v. *Mason*, 2 *Bing. N. C.* 359, *s. c.* 5 *Law J. Rep.* (*n. s.*) *C. P.* 57, *Smith* v. *Dixon*, 7 *Ad. & El.* 1, *s. c.* 6 *Law J. Rep.* (*n. s.*) *K. B.* 233, and *Nash* v. *Breeze*, 11 *Mee. & Wels.* 352, *s. c.* 12 *Law J. Rep.* (*n. s.*) *Exch.* 305. *Cur. adv. vult.*

Tindal, C. J. Now delivered the judgment of the Court.—This was an action of assumpsit, in which the plaintiffs declared, for that whereas the defendants were and are corn-factors at Liverpool, and that heretofore, to wit, on the 23d of June 1842, in consideration that the plaintiffs, at the request of the defendants, had consigned and delivered to them as such factors a cargo, consisting of 8,563 bushels of wheat, to be sold and disposed of by the defendants as such factors, for and on account of the plaintiffs for reasonable commission and reward to be paid by the plaintiffs to the defendants in that behalf. The defendants promised to obey and observe the lawful orders and directions of the plaintiffs, to be given by them to defendants in regard to the sale and disposal of the wheat. That the defendants afterwards sold and disposed of a small part of the wheat at 6*s.* 4*d.* per bushel, and although the plaintiffs ordered them not to sell any more for less than 7*s.* per bushel, yet the defendants sold for lower prices. There was a second count in the same form respecting another cargo of wheat. The defendants pleaded, thirdly, to the first count, that after the cargo of wheat therein mentioned had been so consigned to the defendants as such factors, and before the committing of the alleged breach of promise, to wit, on &c. the defendants as such factors became and were under advances to the plaintiffs in respect of the said consignment of the said cargo of wheat to a large amount, to wit, to the amount of 3,000*l.*, and which said sum so advanced to the plaintiffs was then due and payable by

the plaintiffs to the defendants, and which advances the defendants had come under by reason of having accepted divers bills of exchange for the plaintiffs, and at their request against and on the security of the said cargo before the giving of any of the orders in the said first count mentioned; and that afterwards, and before the committing of the alleged breach of promise, the defendants gave notice to the plaintiffs, that they required the said sum of money so advanced by them as such factors to be repaid to them; and that if the plaintiffs did not repay them, they (the defendants) should sell the whole of the residue of the said wheat, and out of the money produced by such sale should repay themselves the money advanced. That a reasonable time for repayment elapsed; that the plaintiffs did not repay the advances; and that for the purpose of repaying to them, the defendants, the money so advanced, it was absolutely necessary for the defendants to sell the whole of the residue of the said wheat, wherefore, for the purpose of reimbursing and repaying to them the sums advanced, they sold the residue of the wheat for the prices in the first count of the declaration mentioned, the same being the best prices which could then be obtained for the same, and that the proceeds were not sufficient to repay to the defendants the whole of the money advanced by them. Another plea stated, that the plaintiffs were indebted to the defendants as factors, for advances against other consignments; and that they had a lien on the wheat in question, for such advances, and a right to have them repaid out of the proceeds of the wheat: it then stated notice and non-payment, and the sale of the wheat as before. Similar pleas were pleaded to the second count. To each of these pleas there was a demurrer. In that to the first of them many special causes of demurrer were assigned; that it was an argumentative traverse of the promise, and bad as amounting to the general issue, for that in answer to an averment in the declaration, that the defendants promised to obey the lawful orders of the plaintiffs, the defendants by that plea professed to shew that they only promised to obey such orders as should not be inconsistent with the right which they claimed, to sell in order to repay advances; that it was uncertain whether they meant to admit or deny their promise as in the first count mentioned; that if they meant to insist that the advances gave them a subsequent authority to disobey the plaintiffs' orders, such authority should have been pleaded as the result of an express agreement, and should not have been left as a mere inference of law, &c. On the argument of this demurrer several objections in point of form were urged against the

plea; and also, that it was bad in substance, which, of course, was the most important question. In order to answer it, let us inquire what are the relative positions of principal and factor for sale. From the mere relation of principal and factor, the latter derives authority to sell at such times and for such prices as he may, in the exercise of his discretion, think best for his employer; but if he receives the goods subject to any special instructions, he is bound to obey them, and the authority, whether general or special, is revocable. This was not denied on behalf of the defendants; but it was contended, that where a factor has advanced money on goods consigned to him for sale, the authority to sell is irrevocable, because coupled with an interest. That may be true, but it was incumbent on the defendant to maintain also that on the failure of the principal to repay such advances within a reasonable time after demand, the authority of the factor is enlarged, and that he has an absolute right to sell at any time for the best price that can be obtained, without regard to the interest of the principal, and without regard to the nature of the authority originally given. No case was cited in which this point appears to have been decided in an English Court. In *Warner* v. *M'Kay* it was incidentally mentioned; and as far as any opinion of the Judges can be collected from the report, it would seem that Parke, B. thought a factor might sell to pay advances, and that Lord Abinger was of a different opinion; and certainly nothing which then passed can be treated as an authority for our guidance in this case. But we were referred to a passage in *Story's Law of Agency*, in his chapter 'on the Right of Lien of Agents,' where he says, "In certain cases where he has made advances as factor, it would seem to be clear that he may sell to repay those advances without the assent of the owner (*invito domino*), if the latter, after due notice of the intention to sell for advances, does not repay him the amount;" and for this he cites a decision in the Supreme Court of Massachusetts, and refers also to *Pothonier* v. *Dawson*. The latter was not an instance of goods placed in the hands of a factor for sale, but of a party in whose hands goods were deposited to secure the repayment, at a time agreed upon, of money lent. In that case, Gibbs, C. J. says, "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited by way of security to indemnify a party against a loan of money, it is *more than a pledge*. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade;" and he proceeds to say that from the nature of the transaction it

might be inferred, that the contract was that the lender might sell and repay himself, if the borrower failed to repay the money at the time agreed upon. We were also referred to *Story on Bailments*, chapter on 'Pawns and Pledges,' sec. 308, where the rule of law is said to be, that "if a pledge is not redeemed at the stipulated time it may be sold by the pawnee to repay himself." But the relation of principal and factor, where money has been advanced on goods consigned for sale, is not that of pawner and pawnee. The goods are delivered for sale, on account of and for the benefit of the principal, and not by way of security to indemnify against a lien, although they operate as such security, the factor having a lien upon them, or upon their proceeds, when sold, for the amount of his claim against the principal. The authority of the factor, whether general or special, may become irrevocable when advances have been made; but there is nothing in the transaction from which can be inferred (to adopt the language of Gibbs, C.J.) that it was part of the contract, that at any time the goods should be forfeited, or the authority to sell enlarged, so as to enable the factor to sell at any time for repayment of advances, without reference to its being for the interest of the principal to sell at that time, and for that price. Nor can we find any principle in the law by which, independently of contract, such authority is given. On this ground it appears to us, that the plea is bad in substance; and it is unnecessary to consider whether this power claimed by the factor is to be considered as an enlargement of his original authority by some rule of law, as arising from some implied condition annexed to the original contract, in which case it would be very doubtful, whether it ought not to be treated as a denial of the contract, as laid in the declaration; and, therefore, bad as amounting to the general issue. For the reasons above given, we think, that the third plea is bad, and the other special pleas are open to the same objections. Our judgment must, therefore, be for the plaintiffs.

Counsel were not present when this judgment was delivered. In Michaelmas term the defendants applied for leave to amend on the usual terms. The Court refused this application, but gave them leave to add two pleas to each count. *Judgment for the plaintiffs.*

RAMUZ *v.* CROWE—MASON *v.* KING.

RIGHT TO RECOVER AT LAW ON A LOST BILL.

THE Supreme Court of Ohio, in *Mason* v. *King*, 15 *O.* 242, held, that "an action will lie, at the suit of the owner of negotiable paper, which has been lost after it fell due, at law; but, if lost before due, the remedy is in Chancery, where the owner can be required to indemnify the maker." In that case the Court say, "this case was reserved for the determination of the single question, whether a recovery could be had upon lost negotiable paper at law, or whether the remedy in such case was in equity. Upon this subject there is a conflict of decisions both in England and in the United States." We had occasion some months ago to examine this question, and notwithstanding the conflict, to some extent, in the decisions in this country, we arrived at the conclusion, that an action at law could not be maintained upon a lost bill, or lost negotiable note, endorsed in blank, or otherwise negotiable by delivery, although the loss was after the same became due, and that this had been the settled law in England for some years. In this, it would seem, from *Mason* v. *King*, we were mistaken. We were influenced very much by the case of *Hansard* v. *Robinson*, decided in the King's Bench, about twenty years ago, after no little examination and deliberation, and the approval of that case by high authority in this country and in England. In the third London edition of *Chitty on Contracts*, by Thompson Chitty, published in 1840, it is said, that "if the creditor *lose* the bill or note either *before* or *after* it was *due*, so that he cannot produce it at the trial, he can neither maintain an action at law against his debtor upon the bill or note, (even if the latter were the acceptor or maker thereof,) or for the original debt, provided the instrument were at the time of the loss endorsed in blank, or otherwise negotiable by mere delivery, so that the instrument might possibly get into the hands of a *bona fide* holder, who could sue the debtor thereon." In the ninth English edition of *Chitty on Bills*, by Chitty and Hulme, published in London in the same year, it is said, page 269–70: "It is now *settled*, that where the bill or note was lost before or after it became due, or after actual demand of payment, and even an express promise to pay, still no action at law can, if it were negotiable, be sustained;" and *Hansard* v. *Robinson* is cited as authority for the proposition. The reasoning

of the learned Judge in that case was also approved by the Supreme Court of New York, in *Smith* v. *Rockwell*, 2 *Hill* 482, and by Judge Story, who remarks—"it may be said, with great confidence, that it will be difficult to overturn, upon satisfactory grounds, the reasoning of Lord Tenterden."

In section 450 of his work on *Promissory Notes*, Judge Story says: "There seems formerly to have been a distinction taken between the case of a loss of the note before it was due, and the case of a loss after it was due, upon the ground that if lost after it was due, no subsequent holder could recover upon the note, except subject to all the equities between the antecedent parties. But it is now clearly settled in England, that whether the note be lost before or after it becomes due, or after actual demand of payment, or even after an express promise to pay, still no action at law can be maintained thereon, but the sole remedy is in equity."

Professor Greenleaf, in the second volume of his work on *Evidence*, section 156, states the law to be, that "if the bill, or *other negotiable security*, be lost, there can be no remedy upon it at law, unless it was in such a state, when lost, that no person but the plaintiff could have acquired a right to sue thereon: otherwise, the defendant would be in danger of paying it twice, in case it had been negotiated. It is also his voucher, to which he is entitled by the usage of merchants, which requires its actual presentation for payment, and its delivery up when paid. Therefore, wherever the danger of a double liability exists, as in the case of a bill or note, either actually negotiated in blank, or payable to bearer, and lost or stolen, the claim of the endorsee or former holder has been rejected. And whether the loss was before or after the bill fell due, is immaterial."

We notice this question now, because it has recently, (Trinity Term, 1847,) been decided by the Court of Exchequer, in the case of *Ramuz* v. *Crowe*, (a brief notice of which we gave in a former number,) and *Hansard* v. *Robinson* has been sustained by that learned Court.

Platt, B., in delivering the judgment of the Court in *Ramuz* v. *Crowe*, said: "In this action the plaintiff, in the third count, declared as the drawer of a bill of exchange payable to his own order, and accepted by the defendant. The defendant pleaded that, after the acceptance of the bill and before the commencement of the suit, the plaintiff lost the bill out of his possession; that the bill remained lost until and at the time of the commencement of the suit, and that the plaintiff at the time of the commencement of the suit was not

nor was he at any time of the defendant's pleading, the holder or possessor of the bill. The plaintiff replied, that by reason of such loss alone he was not the holder of the bill; that the bill, at the time of the commencement of the suit, had not been nor was endorsed by him, nor transferable by delivery, nor capable of being enforced or put in suit against the defendant by any other person than the plaintiff; that until the loss, he was always the holder, and from thence until and at the time of the commencement of the suit, was alone entitled to be the holder thereof, and to receive the amount thereof from the defendant, and that the defendant, at the time of the commencement of the suit, had due notice of the premises.

"To this replication the defendant demurred; and the question was, whether upon the facts stated in the pleading, the plaintiff was entitled to recover? in other words, whether the payee of a negotiable bill of exchange, having lost it, can, on its arriving at maturity, without its production, maintain an action against the acceptor for the recovery of its amount. On the part of the defendant, it was contended, according to the doctrine laid down by the Court of King's Bench, in *Hansard* v. *Robinson*, that, by the custom of merchants, the holder of a bill ought to present the instrument at its maturity to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill; that the acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer; that to one who should refuse or be unable to deliver up the bill, the acceptor is not bound to pay the sum therein specified. The plaintiff, admitting the general rule of law, sought to except from its operation cases in which the plaintiff's inability to deliver up the bill, resulted from his having lost it while it remained payable to his own order, and cited *Rolt* v. *Watson*, *Wain* v. *Bailey*, and *Cunliffe* v. *Whitehead*. The first and third of those cases, however, do not appear to support the alleged exception. The note in *Wain* v. *Bailey* was not negotiable. It was not payable to order, or to the bearer, but to the plaintiff only, who therefore alone could enforce the payment. In *Cunliffe* v. *Whitehead*, the plaintiff does not show in his declaration that he was endorsee of the bill, but the bailee from a third person, to whom it had been endorsed; and the Court held, that as such mere bailee, he had not any right of action. The general rule is supported by Lord Eldon's observations in the case *Ex parte Greenway*,

and the decisions in *Pierson* v. *Hutchinson*, *Bevan* v. *Hill*, *Mayor* v. *Johnson*, *Poole* v. *Smith*, *Dangerfield* v. *Wilby*, *Davis* v. *Dodd*, *Champion* v. *Terry*, *Long* v. *Bailie*, *Dart* v. *Hinkles*, and *Rolt* v. *Watson*, quoted respectively by the plaintiff's counsel in *Hansard* v. *Robinson*, are authorities in support of the exception. But in the discussion of *Hansard* v. *Robinson*, all those cases were brought before the Court of King's Bench; and that Court, after taking time to consider, overruled such of them as supported the exception, and decided, as we think properly, that according to the custom of merchants, the acceptor of a negotiable bill was not bound to pay, unless the party demanding payment produced, and offered to deliver up the instrument itself. This decision governs the present case. The bill accepted by the defendant was negotiable, and the plaintiff, by reason of his loss of it, being unable to produce it to the defendant, cannot by the law of merchants compel him to pay the amount. As to the third count, therefore, the defendant is entitled to judgment on the demurrer.

SUPREME COURT OF INDIANA: NOVEMBER TERM, 1847.

Humphreys *v.* Comline.

ERROR FROM THE JEFFERSON CIRCUIT COURT.

The law does not impart into a contract for the sale of molasses in barrels, to a grocer for retail purposes, when there was no inspection of the quality, though the barrels were present, an implied warranty that the molasses was fit for such purposes.

Opinion of the Court by Judge Smith. Debt upon a note for $29.93, made by Humphreys and payable to Comline or order, sixty days after date. Plea, the general issue, and cause submitted to the Court for trial without the intervention of a jury. Finding and judgment for the plaintiff for the amount of the note, &c.

The evidence adduced upon the trial is contained in a bill of exceptions. It appears that the note was given for the price of two barrels of molasses, purchased by Humphreys of Comline, at 35 and 38 cents per gallon, which was the market price at that time. Humphreys was a grocer, and purchased the article to sell at retail. There was no inspection of the molasses at the time of the sale. The barrels were brought by Comline to the store of Humphreys,

and looked as if they had not been opened since the molasses had been first put into them. Humphreys proposed to gauge the barrels to ascertain the number of gallons, and Comline agreed to take off two gallons from the marked quantity, and waive the gauging. The latter, when the molasses was delivered, said it was good.

It turned out that the molasses was unfit for table use, and almost worthless. Several persons who had bought of it returned the quantities purchased by them to Humphreys. Comline did not reside at Madison, where Humphreys' store was situated; and when he called to procure payment of the note, Humphreys told him that the molasses was not good; that he had sold some of it, and was obliged to take it back; that the molasses was in his cellar, and that if it was not taken away, he would charge him (Comline) storage for it. Comline then said he had sold some of the same molasses to another person, and had made a deduction in the price. He offered to take the value of the note in trade. Humphreys replied that he did not want the molasses, and requested Comline to take it away. The latter refused to do so, and said he would bring suit upon the note.

It is contended, on behalf of the plaintiff in error, that these facts show there was an express warranty accompanying the sale, that the molasses was good; or that, if the representations of Comline did not amount to an express warranty, under all the circumstances attending the transaction, the law raises an implied warranty that the article was reasonably fit for the purpose for which it was purchased.

An oral affirmation of the quality of an article, which the purchaser has an opportunity of examining, cannot be considered a warranty, unless it is so intended at the time; and where there is no warranty *in terms*, if by the language used a warranty is intended, that intention must be proved. *House* v. *Fort*, 4 *Blackf. R.* 293. It is to be observed, in reference to this point, that when there is any doubt whether statements, made at the time of entering into a contract, were intended to express an opinion or belief only, or as assertions, upon which it was intended that the other party should rely as a warranty, the question thus raised properly belongs to the jury. *Ib. Morrill* v. *Wallace*, 9 *N. Hamp. R.* 111; 8 *Cow. R.* 25; 11 *Wend. R.* 411. As in this case then, the members of the Court below, by the consent and request of the parties, performed the functions of a jury as well as those of the Court, this question must be,

considered as having been decided adversely to the plaintiff in error by the jury to which it was submitted; and there will be the same objection to a reversal of such decision upon a matter of fact, unless there clearly appears to have been a misapprehension of the effect of the evidence, as exists in cases where there has been an ordinary jury trial. We are necessarily less able to decide upon such fact from the evidence as condensed in a bill of exceptions, than the Court or jury, before whom the witnesses were personally examined; and as it is by no means clear that the decision of the Circuit Court, so far as it regards this branch of the case, is erroneous, we should not be warranted in disturbing it.

The counsel for the plaintiff in error base their argument, that there was an implied warranty in this case, as we understand it, upon two grounds. First, that fraudulent representations, as to the quality of the molasses, were made by Comline at the time of the sale; secondly, that independently of such representations, an implied warranty accompanies the sale of an article for a specific purpose, that it is reasonably fit for that purpose.

A fraudulent representation or any fraudulent concealment by the seller, as to the quality of the goods sold, amounts to a warranty in law. 2 *Kent Com.* 479. One party must not practise any artifice to conceal defects, or make any representations for the purpose of throwing the buyer off his guard. *Ib.* 482. But whether there was any such fraudulent representation or concealment in this case, was also a jury question; and there is the same reason for not disturbing the decision of the Circuit Court upon this point, as upon that relating to an express warranty. Though there is some evidence proper for consideration in a question of this kind, there is not enough clearly to establish the fact that the representations made by Comline at the time of the sale were fraudulent. It should have been shown that they were not only false, but known to have been so by him at the time they were made. 10 *M. & W.* 147. Considerable stress is laid upon the circumstance that he proposed to take off two gallons from the marked quantity, in order that the gauging might be waived. It is argued, that therefrom the conclusion should be drawn that he knew the molasses to be bad, and that this was an artifice to prevent the barrels from being opened, and the quality of the contents discovered. This was, to be sure, a circumstance proper to go to the jury for what it was worth in connexion with other circumstances; but of itself it is certainly insufficient to warrant such a conclusion; and there is little else in the testimony be-

fore us, tending to show that Comline had any knowledge at the time of the sale, that the molasses was not of good quality.

The case must rest, then, in its present aspect, entirely on the last position assumed by the plaintiff in error, namely, that the law imparts into a contract for the sale of molasses in barrels to a grocer for retail purpeses, where there was no inspection of the quality, though the barrels were present, an implied warranty that the molasses was fit for such purposes.

The civil law held the vendor of chattels responsible for all latent defects, which rendered them unfit for the use for which they were purchased. A sound price was understood to warrant a sound article. *Poth. on Obl. No.* 18; *Co. Litt.* 102 *a;* 2 *Black. Com.* 451. But the rule of the common law is different. The latter, says Chancellor Kent, "very reasonably requires the purchaser to attend, when he makes his contract, to those qualities of the article he buys, which are supposed to be within the reach of his observation and judgment." If he does not, the maxim *caveat emptor* applies, and he buys at his peril. 2 *Kent Com.* 478. Several qualifications have been made, however, to the original rule of the common law, which was, that the only implied warranty attending a sale of personal property for a fair price, was a warranty of the title of the vendor. Some of the cases, both in England and in this country, it must be conceded, approach so nearly to the rule of the civil law, that it is very difficult to reconcile them with that of the common law as it had been previously understood. In none of them, however, is there any professed intention to adopt the former rule in preference to the latter. They are all based upon some real or supposed necessity for the modification of the rule of the common law, to meet certain classes of cases having in them additional ingredients to those constituting a simple contract of sale.

Thus it appears to be pretty well established, that a warranty that goods are of a merchantable quality will be implied, 1. when an examination of the goods is, from their nature or situation at the time of the sale, impracticable; 2. upon an executory contract to manufacture an article, or to furnish it for a particular use or purpose; 3. in sales by sample, that the bulk should correspond with the specimen exhibited. See *Story on Sales, p.* 314 *& seq.* Under the first head are instanced sales of goods at sea, or stored in the hold of a ship, or in a store-house, so that only the surface can be seen; or in bales, so that an examination of the centre cannot be made without tearing the bales in pieces. *Gardner* v. *Gray,* 4 *Camb.*

R. 144. This rule is indefinite in its nature. One great difficulty in applying it to particular cases is, the ascertainment of what amounts to an impracticability of examination. In *Gardner* v. *Gray*, Lord Ellenborough said a warranty would be implied when "there was no *opportunity* to examine;" and this qualification has been approved and adopted in most of the later cases. *Jones* v. *Bugis*, 5 *Bing. R.* 535; *Brown* v. *Edgington*, 2 *Manning & Grang.* 279; *Chanter* v. *Hopkins*, 4 *Mee. & Wels.* 399.

In the class of cases included under the second head, the "purpose" which is supposed to raise the warranty, has been the subject of much discussion. In *Smith* v. *Manable*, 11 *Mee. & Wels.* 5, where the contract was for the letting of a furnished house, it was held there was an implied warranty that the house was reasonably fit for habitation. But in *Sutton* v. *Temple*, 12 *Mee. & Wels.* 52, where the defendant had contracted for the eatage or pasturage of a piece of land for seven months, and it was found that the pasture was unfit for cattle, owing to the effect of a poisonous substance which had been spread over the field, it was held there was no implied obligation on the part of the lessor, that the pasture was fit for the purpose for which it was taken. The learned Judges endeavored to distinguish this case from that of *Smith* v. *Marable*, by characterizing the latter as the case of a contract of a mixed nature, for the letting of a house *and furniture.* It is by no means established by the cases in England or this country, that the sale of an article for a particular purpose, where the delivery accompanies the sale, always amounts to a warranty that it is fit for such purpose. Those in which it has been so held must rather be regarded as exceptions to a contrary rule. Lord Abinger, in giving his opinion in *Sutton* v. *Temple*, observes that the doctrine maintained in *Smith* v. *Marable*, would not be applicable when the party has had an opportunity of personally inspecting a ready furnished house, by himself or his agent, before entering on the occupation of it.

It is said that in the sale of provisions for domestic use, a warranty is implied that they are sound and wholesome, on the ground that such a warranty is necessary for the preservation of health and life. But it has been denied that any thing can be inferred from the sale of provisions, which may not be inferred to a like purpose in other cases. *Hart* v. *Wright*, 18 *Wend. R.* 456; *Senator Marcy's Opinion; Emerson* v. *Brigham*, 10 *Mass.* 197; *Winsor* v. *Lombard*, 18 *Pick. R.* 57. In the last two cases the warranty is put upon the ground of the deceit; and it is said the only difference is that in the case

of provisions the fraud is more obvious, as when a butcher sells stale and unwholesome meat to his customers as fresh and sound. The artifice is proved by the fact itself, as his knowledge of the falsehood is to be presumed from the nature and duties of his trade or calling. Without deciding this point, however, or whether molasses and such like articles should be included under the term "provisions," if the rule, that by the sale of provisions without any fraud on the part of the vendor, a warranty is implied, be well founded, we think this case does come within such rule, inasmuch as the molasses in question was not sold for immediate domestic consumption, but *as merchandize* to a dealer, to be sold again at retail. To say that, in such cases, all articles which may be used in the diet of the human family, are subject to a rule of law as regards their sale, different from that which prevails in relation to other merchandize, would be to establish a distinction which might prove extremely inconvenient and troublesome in commercial transactions, and one not warranted by any analogous decisions.

If, then, the present case is to be excepted from the operations of the rule *caveat emptor*, it must be for the reason that it should be classed among the cases included under the first head of exceptions above mentioned, in which a warranty is implied from the impracticability or difficulty of making an examination. Supposing we give this rule the most liberal construction of which it is susceptible, what degree of difficulty in such examination shall be deemed sufficient to bring a sale within it? In *Holden* v. *Dakin*, 4 *Johns. R.* 420, there was a sale of paint in unopened kegs; in *Thompson* v. *Ashton*, 14 *Johns. R.* 316, a sale of crockery in crates; in *Hart* v. *Wright*, 17 *Wend. R.* 267, a sale of flour in barrels; in *Salisbury* v. *Staner*, 19 *Wend. R.* 159, a sale of hemp in bales; and in *Hyatt* v. *Boyle*, 5 *Gill & Johns. R.* 110, a sale of tobacco in kegs. In all of these cases, the fact of the articles being enclosed in vessels or packages, was held to be no excuse for the want of an examination by the purchaser. It would seem to us that the difficulty should at least be so great that it could not be overcome by ordinary care and diligence on the part of the vendee. Here the molasses was in barrels, unopened at the time of the sale; but there was, certainly, no difficulty in opening them sufficiently to ascertain the quality of their contents. A very little precaution on the part of Humphreys would have prevented his being imposed upon, by the sale to him of an article which was unfit for the purpose he designed it for; and it is better that he should suffer for the want of such precaution, than

that a door should be opened to an interminable field of litigation for sellers and buyers. If it should be held a sufficient excuse for the neglect to make an examination, that the molasses was in barrels, such an excuse would be equally available in all cases where the article sold is in any kind of enclosure, however readily the vessels or envelopes might be opened. In fact, it would be available in almost every case, where the purchaser should not choose to examine the goods he is contracting for. Persons engaged in trade, such as retail grocers, are to be presumed to be capable judges of the qualities of the articles in which they deal; and to say that in case they should not choose to exercise their judgment, or to remove any trifling impediment in the way of their doing so, the vendor shall be responsible for all defects, would be almost an entire subversion of the rule of the common law, which requires the purchaser, when he makes his contract, in the absence of an express warranty, and of fraud or deceit, to attend to the qualities of the articles he buys. *Judgment below affirmed.*

SUPREME COURT OF ILLINOIS: DECEMBER TERM, 1847.

JUSTUS VAIRIN ET AL., PLAINTIFFS IN ERROR, *v.* FRANCIS H. EDMONSON, DEFENDANT IN ERROR.

ERROR TO SANGAMON.

Against the prosecution of a writ of error, it was pleaded, that the plaintiffs, at the time of suing out their writ, were bankrupts, and previous to that time had been so declared, under and by virtue of the Act of Congress, approved August 19, 1841, entitled "An Act to establish a uniform System of Bankruptcy," &c., and that all their property, &c. had become vested in the assignee by operation of law, by virtue of a decree of the United States District Court, in and for the State of Louisiana, whereby they were declared bankrupts, and said assignee was appointed, &c.: *Held*, that the plea was bad, because there was no averment therein as to the time when they were declared bankrupts, so that the Court could determine whether the cause of action, upon which the writ was prosecuted, accrued before or after the decree of bankruptcy. *Held*, further, that the averments as to the place where, and of the Court which rendered the decree, were not sufficiently explicit: *Held*, also, that it was not necessary to state in the plea the name of the assignee.

THIS cause was heard in this Court upon several pleas in bar of the writ of error, and on demurrer to the same. The material facts are set forth in the Opinion of the Court sustaining the demurrer.

S .T. Logan, for the plaintiffs in error, demurred to the pleas in bar, and assigned the following as special causes of demurrer, to wit, as to the first plea:

1. The defendant does not state in his said plea *when* the plaintiffs in error were declared bankrupts.

2. The said plea does not state that said plaintiffs in error were declared bankrupts at any time subsequent to the rendition of the judgment in the Court below, or even to the bringing of the suit in the Court below.

3. The said plea does not allege that the right of the plaintiffs in error to prosecute this writ of error existed at the time plaintiffs were declared bankrupts, and vested in the assignee in bankruptcy by showing any facts from which such vesting results.

4. It is not alleged that any assignee of the effects of the plaintiffs in error has ever been appointed, or who said assignee was, or whether he accepted the office.

5. It is not shown when or where plaintiffs were declared bankrupts. And

6. The act of any Court declaring plaintiffs bankrupts, is matter of record; yet the allegation is not verified by the record, nor is any profert of the record made.

To the third and fourth pleas, the same causes apply. Further, defendant does not verify his pleas of release by the record of the Court below, nor make any profert thereof.

J. C. Conkling, for the defendant in error.

The first plea is, bankruptcy of plaintiffs in error before suing out the writ of errror.

The party in interest at the time of suing out the writ of error, must become the plaintiff in error. 2 *Saunders* 46, *note* (6); *Graham's Pr.* 938.

If the plaintiff in error release his interest in the subject-matter of the suit, before bringing his writ of error, he cannot maintain his action. 2 *Bac. Abr. Error L.*

He, only, can bring error, who is to derive advantage from the reversal of the judgment. 2 *Bac. Abr. Error B.*

The Opinion of the Court was delivered by

Denning, J. The record in this case shows, that Francis H. Edmonson, the plaintiff below, on the 17th day of March, 1842, sued out from the Sangamon Circuit Court, a writ of attachment against Justus Vairin and James T. Kelly, defendants, who were partners, trading and doing business under the name, style and firm of Justus

Vairin & Co., New Orleans, and procured a summons to be issued in the same cause against Opdycke, Tinsley & Co., as garnishees of the said Vairin & Co.; that at the July term of the said Circuit Court, 1842, judgment was rendered by default against the said Vairin & Co., and in favor of the said Francis H. Edmonson, for the sum of two thousand, seven hundred and ninety-nine dollars and thirty-one cents; that, at the same term, Opdycke, Tinsley & Co., as such garnishees, filed their answer to the interrogatories propounded to them by the plaintiff, admitting their indebtedness to Vairin & Co., in the sum of one thousand, one hundred and forty-seven dollars and seventy-four cents, for which judgment was rendered in favor of the said plaintiff.

The defendants below, on the 3d day of February, 1846, sued out from this Court a writ of error, removing the cause into this Court for the purpose of correcting alleged errors in the record. The plaintiffs below interpose four pleas, intended as pleas in bar of the writ of error, to which pleas there was a general demurrer with the assignment of special causes.

The second, third, and fourth pleas are substantially the same, and allege that Opdycke, Tinsley & Co., are the real persons who prosecute this writ of error, and that, by appearing in the Court below as garnishees, and acknowledging their indebtedness to Vairin & Co., have thereby released all errors in the proceedings of this cause. This position, we think, cannot be maintained. Their answer is not the result of their own voluntary act. They are required by the provisions of our statute to answer all such interrogatories as may be propounded to them by the plaintiff below, touching their indebtedness to the defendants, or suffer judgment by default, and in so answering, they waive nothing. But in another point of view, it will be observed from the assignment of errors herein, that they are not complaining of errors committed to their prejudice. It is Vairin & Co. who prosecute this writ of error, and who allege that errors have arisen in the proceedings and rendition of judgment against them, which they wish to reverse and correct in this Court. We are therefore of opinion that the second, third and fourth pleas are no bar to the writ of error.

The first plea, after giving the title of the case, is as follows, to wit: "And said defendant in error comes and defends, &c., and says, that said plaintiffs in error ought not to have and maintain their writ against him, because he says that, at the time of bringing their writ of error, said Justus Vairin & Co., the plaintiffs in error,

were bankrupts, and previous to that time, to wit, February 3, 1846, when writ of error was brought, had been declared bankrupts, under and by virtue of the law of Congress, approved August 19, 1841, entitled "An Act to establish an uniform System of Bankruptcy in the United States," and that, at the said last mentioned date, all the property, and rights of property, and pecuniary interests whatsoever, and causes of action of said plaintiffs in error, had become vested in the assignee of said bankrupts, by operation of said law, and by virtue of the decree of the United States District Court in and for the State of Louisiana, whereby said plaintiffs in error were declared bankrupts, and said assignee was appointed; and this the said defendant in error is ready to verify: wherefore he prays that plaintiffs in error may be barred of their writ of error."

We are of opinion that this plea is a good plea in bar of the writ of error, if properly pleaded, though defective in form. It will be observed on an examination, that it no where states *when* the plaintiffs in error were declared bankrupts. The plea alleges that the writ of error was sued out from this Court on the 3d day of February, 1846, and that, previous to that time, the plaintiffs in error were declared bankrupts, but how long previous, we are left entirely ignorant. From any thing that appears in this plea, the cause of action, upon which this writ of error is prosecuted, may have arisen subsequent to the time when the plaintiffs in error were declared bankrupts; and if so, they certainly would have the right to prosecute this writ of error; and hence it should be shown, that the debt or cause of action herein subsisted at the time of the said plaintiffs' bankruptcy; for then it would appear to have passed to the assignee, and the plaintiffs in error would have had no further interest or control in the matter. Again, we think the averments in the place where, and of the Court by whom the plaintiffs are alleged to have been declared bankrupts, are not sufficiently explicit. The plea should have been verified by the record, as the question which it attempts to raise must be determined alone by the record.

It is alleged as a ground of demurrer to this plea, that it does not set forth the name of the assignee of the plaintiffs in error. We do not think it necessary that it should. By a reference to the third section of the law of Congress in relation to bankruptcy, approved August 19, 1841, it will be found, that whenever a person is declared a bankrupt within the law, all property, rights of property, &c., are divested from him by the mere operation of said law,

without any other assignment or conveyance whatever; and when once so divested, we apprehend that the bankrupt can exercise no further control in the settlement or disposition of his estate in any manner whatever. The plea is bad, though the Court, on proper application, might grant leave to amend it.

The demurrer is sustained to all the pleas. *Demurrer sustained.*

QUIETING OF LAND TITLES. SPEECH OF MR. LAWRENCE, IN THE HOUSE OF REPRESENTATIVES OF OHIO, UPON HIS "BILL TO QUIET LAND TITLES IN OHIO."

[It is with deep regret that we have seen the defeat of this bill. We have had much reason to applaud the indefatigable industry and discriminating judgment of Mr. Lawrence, as Chairman of the Judiciary Committee. But it is not because of our esteem for the author, that we regret the failure of this bill. It is because we believe the law proposed would have been a great boon to our State. Legislation should discourage unjust litigation. Those who have honestly paid for land, and improved it, should be able to feel, before they die, that the home they have thus earned and consecrated, is really theirs. But let Mr. Lawrence speak for himself. W.]

Mr. Lawrence said that the bill was one of vast importance, and if passed into a law would be one of the most useful enactments on our statute book. It was not new or novel in its provisions, as other States had passed a similar law, and the only question for us to determine was, whether we would afford to our citizens the same protection and security in their land titles, that were enjoyed by citizens of other States. The bill affords security to the following classes of land titles. It provides that no legal proceeding shall be prosecuted to recover lands sold under judgments, decrees, or orders of Courts, by Sheriffs, Masters in Chancery, Executors, Administrators, or Guardians, unless commenced within five years after the sale by the person whose land may be sold. It provides also as to the Virginia Military District, that where lands have been held and occupied for seven years by virtue of a connected title in law or equity, under an entry survey or patent, by one occupying honestly and in good faith, no legal proceeding shall be instituted by the claimant of an adverse entry, survey or patent, to recover the title or possession. There is in favor of minors, unmarried women, persons *non compos mentis*, and persons imprisoned, a saving clause, permitting them, within five years after the disability is removed, to commence a suit for the recovery of rights if they have any.

These are, in brief, the provisions of the bill. They seek not to divest any right, not to rob any one of a just claim, but to protect the honest occupant of the soil, who by his labor has enhanced the value of his land and secured himself a home, in the enjoyment of his honest rights. The bill is in fact a short Statute of Limitations, the main object of which is to cut off mere technical defects in titles, to bar fraudulent and dishonest claims, and thus give security to those who honestly and in good faith have acquired titles. As to the sales under judicial proceedings, Indiana, by a law of that State, had done all that this bill proposed. And why? She had seen that defects, technical errors, would occur in judicial proceedings; and her wisdom had been evinced by declaring that such defects should not forever, or for a long period, be suspended over land titles, as a source of endless litigation, doubt and difficulty.

Why, sir, as the law stands now, if a tract of land be sold, and the writ happens, by mere accident, to have no seal, the judgment debtor, whose debt is paid by a sale of the land for twenty-one years, may come in and say the purchaser shall not hold the land he has honestly bought. Is this right, or just, or honest? And yet, sir, that is but a single one of the many difficulties in judicial titles. Only a little more than year since, a suit was pending in the highest Court of the State, in which it was sought to defeat a judicial sale under an attachment proceeding, because the notice of the attachment had not been published quite so long as the Statute directed. The Court sustained the title, but it is now understood that the Circuit Court of the United States had reversed the principle settled in that case. What will be the effect of this? How many titles will be upturned and subverted? How many happy homes will be rendered disconsolate, if we sanction the upturning of judicial titles for such a cause, after the lapse of twenty or thirty years? Sir, it is our policy to say in all such cases to claimants, if you will take advantage of these defects, you must not wait a quarter of a century—you must not lie by for your prey, and pounce upon it only when it suits your convenience, after years of labor have rendered it valuable and an object of grasping and designing men.

Mr. L. proceeded to show, in a speech at length, the justice and policy of the bill as to judicial titles, and the necessity of passing it into a law.

But, Mr. Speaker, (said Mr. L.,) there is a much greater necessity for the provisions of this bill relating to the Virginia Military District. On this subject I have received a letter from a gentleman residing in this District, in which he says:

"The alleged defect in our land titles in this section of the State is causing us much trouble and expense. The occupying claimants in most cases seem to have all the equity in their cases, but hold under conveyances not strictly and technically legal. These defects generally grow out of circumstances attending the early settlement of the country. There were not then the facilities for investigating titles that there now is. The early settlers were not aware of all the legal requisites and technicalities necessary to make conveyances and titles perfect. If any thing can be done by the Legislature to prevent litigation that seems more designed to extort money by way of compromise than to obtain justice, it should be done."

This, sir, I presume is from "one of the early settlers," and is literally and emphatically true. Owing to the loose and imperfect mode of acquiring title and making conveyances, adopted at an early day, much litigation is springing up, and as lands become valuable, old stale claims without justice are being pressed forward, while honest men are made to suffer

Mr. L. then proceeded to explain the manner of locating the lands in the Military District, and to show the source of difficulties in their titles. In this district more than 25,000 acres are covered by conflicting entries and surveys. These conflicts in most instances grow out of inadvertence and the loose mode of defining their boundaries. Who, then, should be protected—the man who, under a patent, has held a survey covered in part by a conflicting survey for a series of years, or the one who with less claim does not occupy it? And yet, as the law now stands, in many cases a possession for half a century would not settle the title. It is a principle of law that the Statute of Limitations does not run against the Government, and hence, if one survey should be patented in the year 1800, and a prior conflicting survey should be patented in 1848, the last patent would hold the land. Is it right that the occupant for forty-eight years under a patent should be turned off to make room for an intruder, whose very negligence was his only claim to the labor put upon the soil by the occupant?

But this is not all. Forty years ago an entry and survey might be made by a locater of military lands after the holder of the warrant was dead. Under the law, as then understood, it was void. Another is made of the land and patent issued, under which it is occupied for forty years, and in 1847 the heirs of the original owner of the warrant procure a patent under a law of Congress of 1836, declaring such entries valid, and suit is brought forty years after the first patent issues. Is this right? The government that makes titles should protect them; and if Congress could or did not, we

should. In this case the heirs might withdraw their warrant, and re-locate it, and thus get all that they should have, and that would do no injury to any one. If this bill passed, they would be compelled to do so.

But this is but a single class of the difficulties in the title. Mr. L. then proceeded to show that the defects in the titles grew out of defective powers of attorneys, defective transfers of warrants, defective wills in other States, and in various other ways, all of which he debated at some length.

The gentleman from Clark (Mr. Anthony,) is very strenuous in his opposition to the bill, and he tells the House it protects occupants who have no title against the heirs of Revolutionary soldiers. This is a most mistaken and erroneous idea, as I will show. The bill expressly declares, in section 7, that the occupant, in order to be protected, must have "possession and a connected title in law or equity, derived under any entry, survey, or patent issued by the United States." And who sir, is it that has these titles? It is the heirs of Revolutionary soldiers, or those who have purchased from them. These lands were all in the first instance granted to Revolutionary soldiers and their heirs, and they have sold them to citizens who now hold them. The bill is not designed then to cut off the claims of heirs, but to protect occupants who hold under a title derived from the soldiers or their heirs against land speculators, and as they are sometimes termed, "land-pirates," who are hunting up stale claims with which to oust the honest occupant from his possessions. By the bill heirs are expressly protected. They have five years after arriving at the age of majority to assert their claims even though they should be merely technical.

Mr. L. proceeded to show that Kentucky had enacted a law like this, and after some further remarks closed by saying that he had discharged his duty by advocating the bill. The policy of the law was to discourage unnecessary litigation and stale claims to land. This was manifest to all who knew the effect of doubtful titles upon the prosperity of any section of the State. Law-suits should not be immortal while men are only mortal. The passage of this bill would be a measure of public policy to which any member might recur hereafter with pride and pleasure: its effects would be benefits and blessings hereafter to the people of the State.

SUPREME COURT OF INDIANA: NOVEMBER TERM, 1847.

Barb *v.* Fish.

ERROR TO THE BOONE CIRCUIT COURT.

A verdict and judgment for the plaintiff in an action of trover, does not necessarily and *per se*, vest the right of property in the goods specified in the plaintiff's declaration in the defendant, so as to estop the plaintiff from pleading property in himself or others in an action of replevin afterwards brought against him by the defendant in the trover suit for the same goods.

Opinion of the Court by Judge Smith. This was an action of replevin, commenced in the Boone Circuit Court by Fish against Barb. The declaration contains two counts—the first, for the unlawful taking and detention, and the second for the unlawful detention of two steam boilers.

At the April term of the Circuit Court, in 1844, the defendant filed five pleas. The first was a plea of *non cepit*, to the first count, upon which issue was joined. The second plea averred that the said boilers were, at, &c., the property of the defendant, and not the property of the plaintiff. The third, fourth, and fifth pleas alleged property in the defendant, and divers other persons.

The plaintiff filed a replication to each of the pleas, except the first, setting forth the record of a former suit in trover, in the same Court, between the same parties. This record shows, that at the April term, 1843, Barb filed his declaration against Fish for the alleged trover and conversion of certain goods and chattels, to wit, saw-mill irons, grist-mill irons, steam chest, throttle-valve, saw-mill crank, steam boilers, fly-wheel, steam-pipes, force-pump irons, and a steam engine, all of the value of one thousand dollars; and that he afterwards obtained a verdict and judgment for the sum of twenty-five cents for his damages. The replications aver that said judgment is still in force, and that the said steam boilers described in the declaration of Barb in the trover suit, are the same steam boilers named in the declaration in the present suit, and pray judgment if the said Barb ought to be admitted against the said record, to plead the pleas aforesaid, &c.

There are rejoinders to these replications, denying that the steam boilers in the declaration in the present suit mentioned, are the same alleged to have been found and converted in the action of trover, and alleging that no evidence was given on the former trial of and concerning the said boilers, or the conversion thereof, &c.

Each of the rejoinders was demurred to specially. The Court below sustained the demurrers to the rejoinders, and thereupon the defendant withdrew his plea of *non cepit*, and judgment was rendered for the plaintiff.

The main question in this case is, as to the sufficiency of the plaintiff's replications; that is, whether the suit and judgment in trover, replied by Fish as matter of estoppel, operated as a transfer of the right of property in the chattels described in the declaration, so as to preclude Barb from pleading his ownership in this action.

There seems to be much uncertainty and contradiction in the the cases reported, as to how far or under what circumstances, a judgment in trespass or trover vests the right of property in the goods in the defendant. One of the earliest reported cases bearing upon this question, is that of *Brown* v. *Wooton*, *Cro. Jac.* 73—*Yelv.* 67—*Moore* 762. That was an action for certain goods, where the defendant plead a judgment and execution in behalf of the plaintiff against a third person; and the plea was held to be good.

In this case a distinction was made by the Court between the demand and the recovery of a thing certain and a thing uncertain; and it was held, that while in actions *ex contractu*, where two or more are jointly bound, a recovery and execution against one, without satisfaction, was no bar to an action against the other, that when the demand rests only in damages, as in trespass, a recovery and judgment against one was a bar against the other; for the uncertain demand being now made certain by the judgment, the plaintiff shall not resort to the uncertain demand again. This distinction does not appear to have been subsequently recognized and established as good law. See *Livingston* v. *Bishop*, 1 *Johns. R.* 290, and cases there cited. In this latter case, Chief Justice Kent questions the extent of the decision in *Brown* v. *Wooton*, and holds that a recovery against one joint trespasser is not alone a bar to a suit against another.

The next case is that of *Adams* v. *Broughton*, 2 *Strange* 1078, and more fully reported in *Andrews* 18. An action of trover had been brought against one *Mason* and judgment obtained, whereupon a writ of error was brought. Another action of trover was then brought by the same plaintiff, for the same goods, against Broughton. On a motion to hold the defendant last named to special bail, it was said by the Court, according to Andrews, Chief Justice Lee being absent—"the property of the goods is entirely altered by the judgment obtained against Mason, and the damages recovered in

the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had, and this against all the world." And therefore the motion was denied. According to Strange, Mason had obtained an injunction on showing that the property had been delivered to Broughton, and therefore the action was brought against the latter. There seems to be some uncertainty about this case, and it is so imperfectly reported that it cannot be regarded as of much value.

It is an unsettled question, however, whether a judgment in trespass or trover, does, by implication of law, *per se*, transfer the title of the goods to the defendant, without payment or satisfaction of judgment. 2 *Kent Com.* 388–9, *and note a, 3d edit.* The decisions on this point are contradictory. In Pennsylvania it has been held, that the recovery of a judgment, without satisfaction, changes the right of property, and divests the plaintiff's title. *Floyd* v. *Brown*, 1 *Rawle* 122; *Marsh* v. *Rice*, 4 *Rawle* 273; *Merrick's Estate*, 5 *Watts & Serg.* 16. In Virginia and South Carolina, the same rule seems to have been adopted. *Merrell* v. *Johnson's Adm.* 1 *Hen. & Mumf.* 449; *Rodgers* v. *Moore*, 1 *Rice* 60; *Wilburn* v. *Bogan*, 1 *Spears* 179. In *Campbell* v. *Phelps*, 1 *Pick. R.* 62, this point was passed over, and the decision made upon another. Chief Justice Parker, in delivering the opinion of the Court, expresses some doubt as to the correctness of the doctrine, that a judgment recovered in trespass or trover, is of itself a bar to another action by the same plaintiff for the same goods, and alludes to some inequitable consequences which would result from such a rule if established. Justice Wilde, however, in a dissenting opinion in the same case, expressly denies that the mere recovery of a judgment for damages in these actions, will operate so as to vest the property in the defendant.

In New York it has been held, that the right of property would not vest in the defendant without a satisfaction of the judgment. *Curtiss* v. *Groat*, 6 *Johns. R.* 168, was an action of trover for 600 bushels of coals. The coals were on the defendant's land, and made out of his wood. There had been a former suit in trespass between the same parties, for damages for cutting the timber and making it into coals, and the value of the timber cut, and a counter demand for the coals had been submitted to the jury. The Court held it was sufficient in this case, that the demand for the coals had been once submitted to the jury, but that, putting the former trial out of the question, the plaintiff had no right to the coals, on the principle that a wilful trespasser cannot acquire a title to property merely by

changing it from one species to another. It was admitted that a recovery in trespass or trover for a specific chattel taken or detained, *and execution done thereon*, would change the property; but it was denied that this case came within the rule, the recovery in trespass not having been for the coals.

The point came up more directly in *Osterhout* v. *Roberts*, 8 *Cow. R.* 43. This was an action of trover, for a watch. The defendant pleaded that a previous judgment had been obtained by the plaintiff for the value of the same watch against the defendant's son, on which the son was imprisoned sixty days in the county jail. It was held that the property in the watch had not been transferred by the previous judgment, as the imprisonment was not an actual satisfaction of it.

In *Betts & Church* v. *Lee*, 5 *Johns. R.* 348, the Court seems to have gone a step further than in either of the above cases, and to have denied that even payment of damages to the value of the goods taken, changed the rights of property so as to enable the defendant to assert an ownership in a subsequent suit against the assignees of the plaintiff. Lee had cut down trees and made them into shingles on land belonging to one Browne. The latter had brought an action of trespass against Lee, which was discontinued on Lee's paying the value of the timber cut. The land was afterwards conveyed by Browne to Betts & Church, who prohibited Lee from carrying away the shingles, and converted them to their own use. Lee then sued Betts & Church, and the question was, whose property were the shingles after the settlement of the suit by Browne against Lee, for cutting down the trees; and it was held that the settling of the suit for the trespass and recovering a compensation, did not, *per se*, transfer to the trespasser a right to the timber cut down and remaining on the land.

It seems also to have been decided in Maine, that a judgment in trover, without satisfaction, against one trespasser, is no bar as to an action against another person for a different trespass upon the same property. *Hopkins* v. *Hersey*, 20 *Maine R.* 449.

It will be impossible to reconcile these various decisions with each other, and with the doctrine laid down in the books, upon the grounds assumed in them; but perhaps the subject has been somewhat obscured by the manner in which the general doctrine has been stated in its application to particular cases. There are un-

doubtedly instances where a subsequent action cannot be maintained, although there has been no satisfaction of the judgment, and although no damages may have been recovered: and again, there are others, where a judgment in trespass or trover, either with or without satisfaction, cannot vest an absolute right of property in the defendant. The question whether another suit can be maintained or not, appears to depend, in many cases at least, not upon the satisfaction of the judgment, but upon who were the parties to the former suit, and what was decided by it. It is a clear principle of law, that the same plaintiff cannot sue the same defendant twice for the same cause of action. If he has brought an action of trover which has been decided, he cannot bring another action against the same defendant for the same goods, whether the judgment has been satisfied or not. Nor, if he should fail in the first suit, can he sue again in the same or in another form of action. This principle is illustrated in *Kitchen* v. *Campbell*, 2 *Black. R.* 827, which was an action of assumpsit, where the plaintiff had previously brought trover for the same goods, in which first suit the judgment was for the defendant. On the other hand, trover may be brought by a bailee, in which case a judgment and satisfaction could not divest the title of the general owner, and convey it to the defendant. Again, this action may be brought for title deeds, leases, bonds, bills of exchange, promissory notes, &c.; and it is obvious that the judgment, even when satisfied, could not vest the property described in some of these instruments, or a legal right to enforce the obligations specified in the others in the defendant.

When goods are wrongfully taken or detained, the injured party may have his choice of remedies. He may have his action of replevin, to recover the specific articles, or an action of trover, to recover damages for the conversion; and if his choice of the latter remedy is to be regarded as an election to consider the defendant a purchaser, and go for the price or value of the goods instead of the goods themselves, by which election he is estopped from afterwards claiming a right of ownership to the goods, it is not easy to perceive, upon principle, how the satisfaction, or non-satisfaction of the judgment could alter his position. If, upon this hypothesis, the defendant is to be treated as a purchaser from the time of such election—that is, from the time the action was brought,—the right of property must also be considered as having passed at that time. This would perhaps be the case if the plaintiff should waive the tort and bring assumpsit, which he might do if he was the general owner

of the property. But we apprehend this cannot be correct doctrine in trover. Bailees and others having only a special interest in the goods, would have no authority to sell to the defendant if they were disposed to make such an election. The damages recovered are in compensation of the injury done to the plaintiff by the wrongful act of the defendant, which is clearly distinguishable from the price or value of the goods taken, though, ordinarily, the value of the goods is said to be the measure of such damages. The fact of the conversion does not necessarily import an acquisition of property in the defendant. 1 *Chit. Plead.* 167. So the action may be sustained, although the goods come into the possession of the plaintiff by redelivery or recaption, before the action is brought, "which doth not purge the wrong or make satisfaction for that which was done to the plaintiff by detaining the goods." *Jac. Law Dic. tit. Trover;* 1 *Dana Abr.* 21; *Cook* v. *Hartle*, 8 *C.* & *P.* 568. During the progress of the action the property may be surrendered in mitigation of damages. 3 *Steph. N. P. Shar's edit.* 2715; 3 *Chit. Gen. Prac.* 686. And it seems that upon recapture or reacceptance by the plaintiff, of chattels, for the conversion of which judgment has been obtained, the defendant will be entitled to relief on motion to have entry of satisfaction made, or in equity by injunction ,to prevent the collection of the judgment. *Coomb* v. *Sansone*, 1 *Dowl. & Ry.* 201. This practice is entirely inconsistent with the idea that the defendant is to be treated as a purchaser, at any period, at least before he has made actual satisfaction to the plaintiff for the value of the goods. How far, or in what cases, if any, such satisfaction would operate to divest the title of the plaintiff, so as to prevent him from bringing an action against other parties than the defendant to the former suit, where he otherwise might, it is not necessary for our present purposes to inquire.

In the case now under consideration, Barb had sued Fish in trover, and recovered judgment; whereupon Fish brought this action of replevin against Barb, to recover the articles for the conversion of which the latter had first brought suit. Upon what principle the damages in the trover suit were assessed, does not appear; but the judgment is evidently for a nominal sum only. Such being the fact, it is clear the value of the goods could not have been estimated by the jury in making up their verdict. This is not the case, then, of a plaintiff in trover pursuing another remedy or another party after having had one adjudication in his favor, but of the defendant claiming the right of property in the goods for the conversion of which

the action had been brought against him, although nothing had been recovered for their value, and relying upon the abstract principle of law, said to be settled by some of the cases before cited, that a judgment for damages in this form of action, necessarily and *per se*, transferred the title and vested the right of property in him to the goods described in the former suit. We are of opinion that the judgment set out in the replications did not have that effect, and that Barb was not thereby estopped from pleading ownership in himself or others. The replications were therefore insufficient, and the judgment for the plaintiff erroneous. *Judgment reversed, and cause remanded for a new trial.*

Miscellaneous.

The Profession. We cannot resist publishing the following remarks which we find in a late number of the Pennsylvania Law Journal, appended to a notice of the French work of Mollot, upon the profession of an Advocate. We shall look with interest for the sermons which the writer promises to preach from the noble texts to be found in the work. We trust that he will redeem his promise at an early day.

"The subject of the morals and deportment of the bar, is one of deep interest and importance. There are, in every professional commuuity, however low its standard of propriety may be, rules of conduct whose authority is tacitly recognized, and whose influence is steadfast and undoubted. In legal societies, this is especially the case. At every turn these rules avail. In the struggle of the forum, and the intercourse of the office; in the collision of the trial, and the calmness of consultation; in the warmth of strife, and in the spirit of compromise; under the eye of the Judge, and in the presence of the client, they are every moment applicable. They moderate the warmth of advocacy, they abate the the heat of attack and defence, they protect negotiation, they disarm suspicion, they prevent intrusion, they mark a common enemy. With them, we are a band of brethren, more or less united; without them, we are foes, and every step is among traps and pitfalls. No outside observer can imagine how necessary this meagre code is, to the comfort and quietness of such a society.

"But the subject is not only of importance to members of the profession: it touches the good order and permanence of our government. No stranger reaches our shores, who is not impressed with the influence of the lawyer. For good or evil he is everywhere—in every department of State, in every popular commotion, in every social movement. His voice is heard wherever an end is to be accomplished. It is in vain to raise the cry, 'no lawyers to rule us;" it is vain to spread libels over the public

prints; it is in vain to cast up the mire of prejudice. When the people ferment, the lawyer rises to the surface, and takes the foremost position and the first reward.

"How long this is to last—what changes are in progress—when all professions are to sink in social tumult—whether popular development is to bring about a day when the field shall be the forum, and every man his own advocate—these are questions. But we are not dealing with prediction. Our purpose is more practical. We take our country as we find it.

"To purify and exalt so powerful a body—to strengthen and direct its conservative tendencies—to multiply motives for brotherhood and cohesion—to create a deeper interest in building up than in breaking down—to foster an internal police, are the manifest suggestions of our system. The lawyer sees in such a course his own best interest and advancement, the State its safety and security, society its just tone and balance.

"Palpable as the truth of these remarks must be, to every one who looks about him, no hand is raised to do the work. Our cities swarm with men of the law. They descend through all grades of merit and position. They do whatever their hands find to do. They struggle each for his own good, interest, and reputation. They are selfish and sordid in the game of life, eager and adroit in the pursuit of wealth. And which of them in all the stages of his progress, pauses to bethink him, that he is one of a special class—of a peculiar order; and that he owes an earlier and higher duty to his profession than to himself.

"But the fault is not one of mere omission. The tendency of the age is clearly marked. The voice of the multitude is against the legal community. Leveling begins with the mount of justice. In a sister State, systems are tottering to their downfall, and innovation and experiment walk about the ruins. The day is past when the lawyer can call upon the Legislature to assert his rights. The bar finds no favor at the ballot-box. The influence which impresses the stranger arises from individual energy, and not from association. A cry is going out over the land. Radicalism is infectious as the pestilence. The tide of popular will must soon sweep away our prerogative, unless we stay its waters.

"The remedy is not from without. It is from within. We need not increase our numbers; we need not declaim against the spirit of the age. Aggressive association may be dangerous or imprudent. The work must be one of internal reformation—a reformation having two distinct objects, union and purity. What is our individual, and what our social duty? It is part of our short-coming, that we do not meet these questions. To invite ill will, to lancet corruption, to lift the veil from wrong, to make enemies for conscience' sake, are not pleasant labors. But is it manly to sleep and forbear?

"All good is done by approximation. The stream will be dammed at last, if every wayfarer casts in his pebble. When duty presses upon the earnest mind, opportunity is not wanting. From day to day, from hour to hour, in his very walks, the willing man may do the bidding of his conscience. But if comfort and repose are to rule us, our way will soon be clogged with brambles and overrun with weeds, and reptiles will cast their slime upon us, at every turn in the thoroughfares of life.

"We offer these remarks for what they are worth. We may hereafter deal with the subject again. There are, in this volume, noble texts from which we may preach closely and profitably to the profession. And if we can rouse one reformer, or awaken any enthusiasm in the cause of good morals and manners, we shall have cast our pebble into the current of abuse."

Liability of Cities. A person named Hall has recovered against the city of Boston the sum of $4,416 damages for injuries sustained by his falling into a hole near Pearl street, in that city, which had not been sufficiently guarded to prevent accidents.

Constitution of Wisconsin. This Constitution, which was agreed to unanimously by the Convention, contains the following features, as we learn by the Cleveland Herald.

It prohibits slavery and imprisonment for debt, and provides that the privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome exemption laws. Perfect religious liberty is secured, and no religious test shall be required in officers or witnesses.

White citizens of the United States, residing one year in the State, are electors, and also white persons of foreign birth, who have declared their intention to become citizens under the United States laws on the subject of naturalization.

The Assembly shall never consist of less than fifty-four, nor more than one hundred members; the Senate of not more than one-third, nor less than one-fourth the number of the Assembly. Representatives chosen annually—Senators every second year. Legislature to meet annually, and is prohibited from granting divorces. Election by the Legislature to be *viva voce*; by the people by ballot.

Governor and Lieutenant Governor to hold office for two years. The Governor has the veto power, but the Assembly may pass bills in spite of the veto by a two-thirds vote. The Secretary of State, Treasurer, and Attorney General, are also to be chosen by the people, and continue in office two years. Sheriffs, Coroners, Registers of Deeds, and District Attorneys, chosen by the people of each county for two years, but may be removed from office by the Governor.

The Court for the trial of impeachments shall be composed of the Senate. The judicial power of the State, both in law and equity, is vested in a Supreme Court, Circuit Court, Courts of Probate, and Justices of the Peace, elected by the people, to hold office for two years.

The rule of taxation shall be uniform, and the credit of the State shall never be used in aid of any individual, association, or corporation; and the State shall never contract any debt for works of internal improvement, or be a party in carrying on such works.

The supervision of public instruction is vested in a State Superintendant, and such other officers as the Legislature shall direct. State Superintendant chosen by the people, with salary not to exceed $1200. The Legislature to provide for free district schools, and for a tax to support them. Schools to be maintained at least three months each year to get public money. Provisions also made for Academies, and Normal Schools, and a State University, near the Seat of Government, and such Colleges in connection with it as may be necessary.

Corporations with banking powers may be formed under general laws, and by special act in prescribed cases. All general laws or special acts under this section, subject to amendment or repeal at any time.

Banks prohibited, except under the following regulations: .

The Legislature may submit to the voters, at any general election, the question of "Bank" or "No Bank;" and if, at any such election, a number of votes equal to a majority of all the votes cast at such election, on that subject, shall be in favor of Banks, then the Legislature shall have power to grant Bank charters, or pass general Banking laws, with such restrictions and under such regulations as they may deem expedient and proper, for the security of the bill holders: provided, that no such grant or law shall have any force or effect until the same shall have been submitted to a vote of the electors of the State at some general election, and been approved by a majority of all the votes cast upon that subject, at such election.

Persons engaged in duels, either principals or accessories, disqualified as electors, or holding office forever.

Thrall's Treatise on Land Titles. [A Treatise upon the Laws relating to the Titles to Lands which have been sold for the nonpayment of Taxes. By Walter Thrall. Columbus, O. pp. 120.]

This is the title of a small work recently published at Columbus, and intended for general use. We have not had occasion to examine the book, but from a hasty glance, we think it contains information valuable, not only to the Auditors and other officers, but to the tax-payers, and upon examination will be found to be all the author has promised. We understand it is for sale at Mr. Desilver's.

Perkins' Edition of Collyer on Partnership. [A Practical Treatise on the Law of Partnership; with an Appendix of Forms. By John Collyer, of Lincoln's Inn, Esq., Barrister at Law. Third American, from the second English edition, with large additions to the Text and Notes, by J. C. Perkins, Boston. C. C. Little and J. Brown: 1848. pp. 1090.]

This is a very superior edition of Collyer on Partnership. The work has been greatly increased in size and value by the labor of Mr. Perkins. He has incorporated into the text, as well as appended in the notes, a large amount of valuable matter, elucidating many points in this branch of the law, some of which have been left doubtful in the English authorities, or not decided at all, but have been settled in this country, and others in which the Courts of this country and England have differed. He has added a section on Limited Partnerships, a branch of this department of the law of great importance, from the fact that in many of the States we have special acts authorizing such associations. Ohio is not among those enumerated by Mr. Perkins; but her act to authorize and regulate limited partnerships, passed two years ago, contains substantially the same provisions as the law of Massachusetts, a statement of which, with some adjudications upon the subject, will be found in the work. "Mr. Collyer's chapter on Mines," says Mr. Perkins, "was not deemed of sufficient use to be retained. Much of his chapter on Joint Stock Companies, has been struck out, and in place of the matter removed, the late decisions on the same subject have been inserted."

From the examination we have been able to give this work, we think it decidedly the best edition ever published, and probably better adapted to the use of the practitioner than any other work upon the subject.

The mechanical execution of the work is in the best style of the day. It is for sale at the Law Bookstore of J. F. Desilver, in this city.

"Harbor or Conceal"—Meaning of the terms in the Act of Congress of 1793. In *Driskell* v. *Parish*, *ante* 208, Judge McLean says: "Harboring and concealing, in the act are synonymous; and to make out a case of harboring, there must be proof of concealment, with intent to defeat the claims of the master." In *Vanmetre* v. *Mitchell*, (Pa. L. J. Jan. 1848, p. 115,) Judge Grier says: "The Act of Congress, by using the terms 'harbor or conceal,' evidently assumed that the terms were not synonymous, and that there might be a harboring without concealment. The Act seems to be drawn with great care and accuracy, and bears no marks of that slovenly diction which sometimes characterizes Acts of Assembly, where numerous synonyms are heaped together, and words are multiplied only to increase confusion and obscurity. But neither in legal use nor common parlance, is the word, harbor, precisely defined by the words, entertain, or shelter. It implies impropriety in the conduct of the person giving the entertainment or shelter, in consequence of some imputation on the character of the person who receives it. An Innkeeper is said to *entertain* travelers and strangers, not to *harbor* them,—but may be accused of *harboring* vagabonds, deserters, fugitives, or thieves—persons whom he ought not to entertain."

Common Carriers—Rights of Railroad Passengers. It has been lately decided in the Court of Common Pleas of Boston, that a Railroad Company is liable to the full value of a lost trunk belonging to a passenger, although they may have given notice in a paper thrown daily into the cars, that they would not be answerable for baggage to a greater amount than fifty dollars, unless the same were received and paid for as extra baggage, unless they could show that the owner had actual knowledge of such notice, or it was so notorious that the jury might presume he had actual knowledge of it, and that if the agents of the Company delivered the trunk to a person who had no authority to receive it, they are liable, notwithstanding actual knowledge of such notice by the owner.

Common Carriers—Liability of Express Lines. [New York Superior Court—before Judge Vanderpool. Stoddard & Levering (of Boston) *v.* Long Island Railroad Company.] Action to recover damage sustained by four cases of silk goods, sent from New York by Adams & Co.'s Express in the Steamboat New Haven, belonging to defendants, and injured by the Express crate containing the goods, being accidentally thrown into the dock at Allyn's Point, Conn., where the Norwich cars are taken, and wet by salt water. The accident occurred in January, 1846. The Long Island Railroad Company are sued for the amount as common carriers, being owners of the New Haven. The defence is, that Adams & Co., who contracted and undertook to carry the goods through, and not the owners of the boat, were liable. It appears that Adams & Co. contracted with the Long Island Railroad Co. to be entitled to carry each way, every day, two baggage crates and contents, Adams & Co. to pay about $350 a month for the privilege, to send an Agent always with the crates, and the Company not to be liable for any loss or damage. The Company was not to make a contract of the kind with any other Express Line. The Court, in its charge, held, in relation to Express Lines, such as that of Adams & Co., that they became the common carriers, and not the owners of the Steamboat, their contract being exclusive, and the goods being entrusted to their especial care. The owners of the Steamboat, therefore, in this case, are not liable as common carriers. Then as to the question of neglect in the crate being thrown overboard,—on that the jury may pass. It appears that on getting it on shore at Allyn's Point, it was wheeled off the plank, and fell into the dock; and as to whether Mr. Gould, the Agent of the Express Line, who had charge of it, was to blame, or the persons belonging to the boat, the testimony appears to be contradictory, and the jury must decide upon it. The jury, after a short deliberation, considered that the persons belonging to the boat were to blame, and gave a verdict for plaintiff of $1,436, being principal and interest.

Convention in Ohio. The bill providing for a vote by the people of this State, of "Convention" or "No Convention," to revise the Constitution, has been defeated in the House of Representatives.